

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

ANTHONY ROSS BLACK,	)	3:05-cv-00316-HDM-VPC
	)	3:03-cv-00292-HDM-VPC
Petitioner,	)	
	)	
vs.	)	ORDER
	)	
E.K. McDANIEL, <i>et al.</i> ,	)	
	)	
Respondents.	)	
_____	)	

Before the court is petitioner Anthony Ross Black's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed with the court on May 25, 2005. (3:05-cv-00316, docket 2). Petitioner is an inmate at Lovelock Correctional Center, and has filed this action *in propria persona*.

I. Factual and Procedural Background

On September 3, 1997, petitioner was charged by way of information with seven criminal counts stemming from his alleged

1 sexual conduct with a minor, Britni DeBarge. (Exhibit A).<sup>1</sup>  
 2 Specifically, petitioner was charged with one count of first degree  
 3 kidnapping, one count of lewdness with a child under the age of  
 4 fourteen, and five counts of sexual assault of a minor under the  
 5 age of sixteen. (Id.). According to the information filed by the  
 6 state on September 3, 1997 as well as testimony presented at trial,  
 7 the petitioner drove Britni DeBarge, a ten-year old girl who lived  
 8 in his apartment building, to a remote area in Las Vegas, and  
 9 committed a series of unlawful sexual acts against her will. In  
 10 addition to the various acts described in the counts themselves,  
 11 which included multiple forms of sexual penetration by the  
 12 petitioner, the victim testified that the petitioner forced her to  
 13 urinate on him. (Exhibit HH). Petitioner's alleged deviant  
 14 sexual proclivities became a critical component of the state's case  
 15 at trial, as discussed below.

16 Petitioner's jury trial began on October 15, 1998. (Exhibits  
 17 HH, II, JJ, KK). Several witnesses provided testimony, including  
 18 the victim, Britni DeBarge. (Exhibit HH). He was found guilty on  
 19 all counts (exhibit KK), and was sentenced as follows, with each  
 20 sentence to run consecutively:

21  
 22 Count 1, First Degree Kidnapping, 5 years to life  
 23 and restitution  
 of \$1,000;

24 Count 2, Lewdness with a Child Under 14, 32-120 months;  
 25  
 26

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27 <sup>1</sup> Unless otherwise noted, exhibits referenced are from the government's motion  
 28 to dismiss (3:03-cv-00292, dockets 20, 22-23, exhibits A through DD), and answer  
 to the petition (3:05-cv-00316, dockets 18-21, exhibits EE through VV).

1 Counts 3-7, Sexual Assault on a Minor Under 16 20 years to life  
2 for each count.

3 (Exhibit B).

4 The judgment of conviction was filed on February 16, 1999. (Id.).

5 Petitioner appealed. (Exhibit C). He claimed four grounds  
6 for relief (exhibit R): first, that the trial court had abused its  
7 discretion in admitting evidence of his prior rape conviction, as  
8 well as his Rape Relapse Prevention documents, which he claims had  
9 been improperly obtained. Second, he claimed he had suffered  
10 prejudice at trial when the state failed to conduct a forensic  
11 examination of the inside of his car before it released the car to  
12 the agency holding title. Third, he claimed that the state's  
13 witnesses had improperly supported the victim's credibility and  
14 testimony. Fourth, the trial court had abused its discretion by  
15 allowing the victim to carry a stuffed animal with her to the  
16 witness stand and denying petitioner's motion for a mistrial. The  
17 Nevada Supreme Court affirmed petitioner's conviction, holding that  
18 the trial court properly admitted the evidence of petitioner's  
19 Oregon conviction to demonstrate motive, intent, opportunity,  
20 preparation, plan, knowledge, identity or absence of mistake or  
21 accident. (Exhibit U). The court further held that while the  
22 trial court had erred in admitting documents obtained through the  
23 petitioner's participation in a Rape Relapse Program, the error was  
24 harmless in light of the overwhelming evidence presented against  
25 petitioner at trial. (Id.). With respect to the petitioner's  
26 contention that the state had improperly disposed of the car in  
27 which the crime had allegedly taken place, the court concluded that  
28

1 the car had been rendered useless for the purpose of evidence  
2 collection because it had been in a serious accident following the  
3 crime. (Id.). The court also determined that petitioner had not  
4 properly preserved the issue of prosecutorial misconduct for  
5 appeal, and waived the challenge of the judge's denial of a  
6 mistrial on appeal. Finally, the court concluded that because  
7 petitioner had failed to object to the state's witnesses at the  
8 time of trial, he could not raise the issue of their credibility on  
9 appeal. (Id.). The Nevada Supreme Court affirmed the judgment of  
10 conviction on May 25, 2000. (Id.).

11 Petitioner then filed a *pro se* petition for a writ of habeas  
12 corpus in the state trial court on September 12, 2000. (Exhibit  
13 E). He subsequently filed two supplements to his petition  
14 (exhibits F, G), and the state responded. (Exhibit I). The court  
15 appointed counsel for the petitioner, who then filed a supplemental  
16 petition on behalf of the petitioner. (Exhibit K). The petition  
17 was denied in a written order filed December 6, 2001. (Exhibit Q).  
18 Petitioner appealed (exhibit X), and on May 7, 2003, the Nevada  
19 Supreme Court affirmed the trial court's denial of the petition.  
20 (Exhibit CC).

21 Petitioner submitted a *pro se* federal petition for a writ of  
22 habeas corpus to this court on November 18, 2003 (hereinafter  
23 "First Federal Petition"). (3:03-cv-00292, docket 10). He then  
24 filed a statement of additional claims, adding several new grounds  
25 for relief to his petition. (3:03-cv-00292, docket 13).  
26 Petitioner's First Federal Petition and the additional claims are  
27 ordered such that each ground for relief is broken down into  
28 subclaims labelled "facts", and each of these facts is further

subdivided into subclaims. Petitioner's claims in his First Federal Petition are summarized as follows:<sup>2</sup>

Ground 1. Ineffective assistance of counsel, in violation of petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

Fact 1. Counsel failed to make any investigation into the petitioner's account of events for the purpose of establishing the reliability of the petitioner's testimony at trial and claim of innocence.

a. Counsel did not produce either Jennifer Richards, Britni DeBarge's friend, or the receipt from the convenience store "Grumpy's," which would have supported petitioner's version of events.

b. Counsel did not present evidence of petitioner's "goal oriented activities" to counteract the victim's testimony that petitioner raped her so that he could "go back to prison and die."

c. Counsel did not investigate or present the testimony of Priscilla Pacheco, petitioner's former girlfriend, who could have countered the victim's testimony about petitioner's state of mind and would testify as to his good character.

d. Counsel did not investigate or present the testimony of Frank Pacheco who could have testified about the petitioner's good character.

Fact 2. Counsel failed to investigate the burglary of the petitioner's residence following petitioner's arrest for sexual assault, which formed the basis of petitioner's chief defense at trial. The petitioner informed counsel that the victim's false sexual assault claims were part of a larger scheme perpetrated by the victim, her mother, and her mother's boyfriend that culminated in the burglary of petitioner's apartment. As a result of the break-in, private documents created by the petitioner during his incarceration and treatment for a prior sexual assault conviction ended up in the victim's mother's (Kim DeBarge's) possession. These documents contained descriptions of the

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<sup>2</sup> The court's formulations of these issues and supporting facts are somewhat different from respondents' formulations of them, but the numbering assigned by petitioner and adopted by respondents remain consistent. The court's treatment of petitioner's claims turns upon the language in his petitions, not upon these summaries.

petitioner's sexual fantasies and fetishes, including urination and defecation as a means of sexual arousal.

a. Counsel did not investigate or interview Rodney Jackson, Kim DeBarge's desperate and jealous boyfriend, who the petitioner believed was the likely burglar.

b. Counsel did not investigate or interview Jill Kline, the apartment complex manager, who would have provided information about the victim's association with Jackson as well as her general demeanor just days after the alleged rape.

c. Counsel did not interview or investigate Kim DeBarge, even though Kim DeBarge would have known the sexual assault charges were false, and even though she had participated in the burglary of petitioner's apartment with Jackson.

d. Counsel did not procure Kim DeBarge's phone records to support petitioner's contention that Jackson had burgled his apartment and, using a stolen address book, made telephone calls to Black's friends' phone numbers.

e. Counsel did not investigate or present testimony from Jennifer Richards, the victim's friend. Petitioner believes Richards would have provided testimony that both the victim and Richards had previously been in the petitioner's apartment, despite the victim's testimony to the opposite, which would have bolstered his claim that they were responsible for the burglary.

Fact 3. Counsel failed to interview or investigate the background of the alleged victim, and to request a psychological evaluation of her. The petitioner provided counsel with ample reason to suggest that the victim's mental state, her living environment, and potential physical abuse might lead her to fabricate the charges against him.

a. Counsel should have investigated and sought a psychological evaluation of the victim, which would have provided a critical insight into her motivation and would have shown her to be a "troubled" child.

Fact 4. Counsel failed to object to the state's illegal break in the chain of custody of the petitioner's car; failed to investigate the evidentiary value of the car; and failed to procure an expert criminalist.

1 a. Had counsel investigated into the vehicle in  
2 which the assault allegedly took place, he would  
3 have discovered that after only thirteen days, the  
4 vehicle had been released to its owner/lessor, which  
denied the petitioner an opportunity to conduct an  
independent investigation for physical evidence in  
the car.

5 b. Counsel failed to investigate the existence of  
6 any physical evidence in the vehicle and did not  
7 establish what evidence or testimony the state might  
8 present with respect to the car. Counsel should  
9 have hired an expert criminalist to counter the  
10 state witness' testimony that all physical evidence  
that might have been found in the vehicle was  
obliterated as a result of the rollover accident the  
petitioner was in immediately after the alleged  
rape.

11 Fact 5. Counsel failed to interview each and every witness  
12 for the prosecution. Counsel failed to interview  
13 the victim, Kim DeBarge, Detective Love, C.S.A.  
Horn, and Serologist Cook. He did not interview Kay  
Barrett or Dr. Bruhn.

14 a. Kay Barrett, the woman who discovered the victim  
15 on Calico Basin Road immediately after the alleged  
16 assault, would have been able to testify that the  
petitioner was no longer present on that road.  
Counsel should have investigated into what the  
17 victim said to Barrett and other potentially  
18 relevant information that might have been used to  
undercut the incriminating effects of her testimony  
at trial.

19 b. Had counsel interviewed or investigated Dr.  
20 Bruhn, the State's medical expert, he would have  
21 been able to ascertain how the doctor could diagnose  
"probable abuse" when there was no physical evidence  
to support the finding.

22 Fact 6. Counsel did not object to apparent incidents of  
23 prosecutorial misconduct.

24 a. Counsel did not object when the prosecutor made  
25 false statements during his closing arguments  
26 related to the presence of physical evidence of  
sexual assault, the testimony of Kay Barrett, and  
the petitioner's documents.

27 b. Counsel did not object to the prosecution  
28 receiving stolen property from the petitioner's  
apartment and its failure to investigate the  
burglary of the petitioner's apartment. The

1 prosecution was duty-bound to make a good faith  
2 determination of whether the victim possessed the  
3 documents by determining if her fingerprints were  
4 present on them.

5 c. Counsel did not object to the prosecution's  
6 destruction of exculpatory evidence through the  
7 release of the vehicle in which the assault took  
8 place without notice to the petitioner or his  
9 attorney.

10 d. Counsel did not object when the petitioner's  
11 Sixth Amendment right to confront witnesses against  
12 him was subverted by the admission of statements  
13 made by his prior victim (Velma Williams) without  
14 producing the victim herself.

15 e. Counsel did not object when the prosecution  
16 relied on sympathy for the victim elicited through  
17 the presence in court of the victim's tearful mother  
18 and by allowing the victim to testify while  
19 clutching a stuffed animal.

20 f. Counsel did not object to the prosecution's  
21 potential *Brady* violations in failing to provide  
22 documentation of the victim's alleged psychological  
23 treatment.

24 Fact 7. Counsel failed to object to apparent Equal  
25 Protection and Due Process violations.

26 a. The trial court relied on the legal proposition  
27 that it need not weigh the probative value of the  
28 petitioner's prior bad acts against the prejudicial  
effect because the evidence of an emotional  
propensity for sexual aberration is relevant and  
outweighs any prejudice.

b. The trial court relied on the legal proposition  
that evidence of an emotional propensity to commit  
the alleged crimes was relevant because such evidence  
showed sexual aberration and was admissible.

Fact 8. Counsel failed to prepare the petitioner prior to  
testifying at trial. Counsel did not discuss the  
petitioner's testimony with him and did not provide  
petitioner with a preview of the types of questions  
he would be asked.

Fact 9. The cumulative effect of counsel's failures amounted  
to a breakdown in the adversarial process, rendering  
the trial fundamentally unfair and its outcome  
unreliable.

Additional Claims:



1 Ground 2. During pre-trial proceedings the petitioner suffered  
2 violations of his Equal Protection rights under the Fifth  
3 and Fourteenth Amendments attributable to the ineffective  
4 assistance of counsel.

5 Ground 3. The trial court erred in appointing appellate counsel due  
6 to a conflict of interest between the petitioner and the  
7 attorney, in violation of petitioner's Fifth, Sixth, and  
8 Fourteenth Amendment rights to Due Process.

9 Ground 4. Appellate counsel was ineffective on direct appeal based  
10 on errors of trial counsel and for failing to procure  
11 transcripts of the opening and closing arguments of  
12 petitioner's trial.

13 Ground 5. Prosecutorial misconduct occurred at trial when the state  
14 (1) lied about information within the "treatment  
15 documents;" (2) violated the Confrontation Clause; (3)  
16 broke the chain of custody with respect to the  
17 petitioner's car; and (4) lied during the closing  
18 arguments. These violations were attributable to the  
19 ineffective assistance of counsel.

20 Ground 6. The petitioner's Equal Protection rights under  
21 the Fifth and Fourteenth Amendments were violated when  
22 the trial court relied on legal propositions that had not  
23 been legislatively approved. The violation is attributed  
24 to ineffective assistance of counsel.

25 Ground 7. The petitioner's rights under the Confrontation Clause  
26 were violated when the statements of his previous sexual  
27 assault victim were admitted into evidence through the  
28 testimony of Oregon police officers. This violation  
resulted from the ineffective assistance of his counsel.

Ground 8. Petitioner's Due Process rights guaranteed by the Fifth  
and Fourteenth Amendments were violated when there was a  
break in the chain of custody of the vehicle, permitting  
the state to make the bare claim that the vehicle had no  
evidentiary value due to its post-accident condition.  
This claimed violation resulted from the ineffective  
assistance of trial counsel.

Ground 9. The cumulative effects of all the grounds raised denied  
the petitioner a fair trial as guaranteed by the Fifth,  
Sixth, and Fourteenth Amendments as there was no  
"overwhelming evidence" upon which to convict him.

On February 11, 2004, respondents filed a motion to dismiss  
petitioner's First Federal Petition, asserting that certain of  
petitioner's claims were not exhausted in state court. (3:03-cv-

00292, docket 20). On June 17, 2004, the court granted in part and denied in part respondents' motion to dismiss. (3:03-cv-00292, docket 33). Specifically, the court found that Ground 1(1)(b), Grounds 1(2)(b), (c), (d), and (f), Ground 1(4)(a), Ground 1(5)(a) and (b), Ground 1(6)(a)-(c) and (e)-(f), Ground 1(7)(a) and (b), Ground 1(8) and Grounds 2-9, were unexhausted, and that the motion to dismiss was granted with respect to those grounds. (Id.). The court denied the motion to dismiss, however, with respect to Grounds 1(1)(a), (c), and (d), 1(2)(a) and (e), 1(3), 1(4)(b), 1(6)(d), and 1(9). (Id.). The court ordered petitioner to either voluntarily abandon the unexhausted claims made in his First Federal Petition and proceed with only those claims that had been exhausted, or dismiss the petition without prejudice in order to return to state court to exhaust his state remedies with respect to those claims the court found unexhausted. (Id.). The court denied petitioner's subsequent motion for reconsideration of its order. (3:03-cv-00292, dockets 34-38).

On September 20, 2004, petitioner filed a formal declaration to dismiss his First Federal Petition without prejudice to exhaust the claims the court found to be unexhausted in state court. (3:03-cv-00292, docket 41). The court therefore ordered the action dismissed without prejudice to allow the petitioner to return to state court to exhaust his claims, and closed the case administratively, without entering judgment, on September 29, 2004. (Docket 40, 3:03-cv-00292). The court further indicated that, upon exhaustion of his claims in state court, the petitioner could return to this court, and "make a motion to reopen this action, under the case number, and before the same undersigned United

1 States District Court Judge.” (Id.).

2 On October 7, 2004, petitioner subsequently returned to state  
3 court and filed his second state petition seeking a writ of habeas  
4 corpus, which set forth many, but not all, of those claims in his  
5 first federal petition found unexhausted by this court. (Exhibit  
6 LL). Specifically, petitioner presented claims 1(1)(b), 1(2)(b),  
7 (c), (d), and (f), 1(4)(a), 1(5)(a) and (b), 1(6)(a), (b), (c),  
8 (e), and (f), 1(7)(a) and (b), and 1(8). (Id.). Petitioner did  
9 not, however, present claims 2 through 9 of his first federal  
10 petition. (Id.). Respondents argue that petitioner has therefore  
11 waived those claims for the purposes of petitioner’s second federal  
12 petition now before the court. (Resp. Answer at 18). The court  
13 agrees.

14 In addition to filing his second petition for habeas relief in  
15 state court, petitioner also filed a supplemental habeas petition  
16 based on the doctrine of “actual innocence,” with supporting  
17 documentation, and requested an evidentiary hearing. (Exhibits MM,  
18 NN). Petitioner’s claim in this supplemental petition re-states  
19 his principal defense at trial, and a position that he has  
20 maintained throughout his post-conviction proceedings. He contends  
21 that he had been set up by the victim in an elaborate scheme that  
22 allowed the victim’s mother and her boyfriend to burglarize his  
23 apartment. (Exhibit MM). Among the items stolen from petitioner’s  
24 apartment were the documents relating to his Rape Relapse  
25 Prevention Program, outlining petitioner’s deviant sexual  
26 tendencies. (Id.). Petitioner’s implication with this defense is  
27 that the documents were used to manufacture the false allegations  
28 made against the petitioner by the victim. (Id.).

1 The Nevada trial court denied both petitions. (Exhibit PP).  
2 The denial was affirmed by the Nevada Supreme Court on the basis  
3 that the second habeas petition was time barred and successive  
4 under Nevada law, and the petitioner's claim of actual innocence  
5 was "no more than a rehashing of the claims raised in his first  
6 post-conviction habeas corpus petition," as well as unsupported by  
7 the record. (Exhibit UU).

8 Petitioner thereafter filed a motion seeking to reopen his  
9 habeas case in federal court. (3:03-cv-00292, docket 42). On May  
10 25, 2005, the court granted the motion under a new case number, but  
11 indicated that the case would be a continuation of petitioner's  
12 previous action. (3:05-cv-00316, docket 1). The petitioner filed  
13 a second petition for a writ of habeas corpus (hereinafter "Second  
14 Federal Petition"), which the court docketed in the new case file.  
15 (3:05-cv-00316, docket 2). In his Second Federal Petition,  
16 petitioner substantially re-ordered his claims for relief. (Id.).  
17 Petitioner's claims in his Second Federal Petition are summarized  
18 as follows, with a footnote indicating where that claim may be  
19 found in the First Federal Petition:

20 Ground 1. Ineffective assistance of counsel in violation of  
21 petitioner's Sixth and Fourteenth Amendment Due Process  
22 rights.

23 Fact 1. Counsel failed to make any investigation into the  
24 petitioner's account of events for the purpose of  
25 establishing the reliability of the petitioner's  
26 testimony at trial and claim of innocence.

27 a. Counsel did not produce either Jennifer Richards,  
28 Britni DeBarge's friend, or the receipt from the  
convenience store "Grumpy's," which would have  
supported petitioner's version of events.<sup>3</sup>

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<sup>3</sup> This claim is made in Ground 1(1)(a) of the First Federal Petition.

1  
2 b. Counsel did not investigate or present the  
3 testimony of Priscilla Pacheco, petitioner's former  
4 girlfriend, who could have countered the victim's  
5 testimony about petitioner's state of mind and would  
6 have testified as to his good character.<sup>4</sup>

7 Ground 2. Ineffective assistance of counsel in violation of  
8 petitioner's Sixth and Fourteenth Amendment Due Process  
9 rights.

10 Fact 1. Counsel failed to investigate the background or  
11 obtain a psychological evaluation of the victim,  
12 despite petitioner's insistence that her background  
13 may have led her to fabricate the charges against  
14 him.

15 a. The victim should have undergone a psychological  
16 evaluation, which would have revealed that she was a  
17 "troubled child," and would have provided insight  
18 into why she acted the way she did.<sup>5</sup>

19 Ground 3. Ineffective assistance of counsel in violation of  
20 petitioner's Sixth and Fourteenth Amendment Due Process  
21 rights.

22 Fact 1. Counsel failed to object to the State's illegal  
23 break in the chain of custody of the petitioner's  
24 car; failed to investigate the evidentiary value of  
25 the car; and failed to procure an expert  
26 criminalist.<sup>6</sup>

27 a. Counsel failed to procure a criminalist who could  
28 have refuted the government's claim that the car  
could not be examined for bodily fluid because of  
its condition after it crashed.

Ground 4. Ineffective assistance of counsel in violation of  
petitioner's Sixth and Fourteenth Amendment rights and  
his right to confront witnesses against him.

Fact 1. Counsel failed to object during the pre-trial  
evidentiary hearing when the court admitted  
statements made by petitioner's prior rape victim,  
in violation of his Sixth Amendment right to

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<sup>4</sup> This claim is made in Ground 1(1)(c) of the First Federal Petition.

<sup>5</sup> This claim is made in Ground 1(3)(a) of the First Federal Petition.

<sup>6</sup> These claims are made in Ground 1(4) of the First Federal Petition and the subclaims therein.

confront witnesses against him.<sup>7</sup>

Ground 5. Ineffective assistance of counsel during pre-trial proceedings and at trial in violation of petitioner's Sixth and Fourteenth Amendment rights.

Fact 1. Trial counsel failed to develop a reasonable defense strategy and failed to investigate petitioner's case. In particular, trial counsel failed to substantiate petitioner's allegation about the burglary of his apartment, which he believes was connected to the false sexual assault allegations leveled against him by the victim. As part of the scheme against him, the boyfriend of the victim's mother, R.D. Jackson, was able to obtain approximately \$3,000 from petitioner's apartment.<sup>8</sup>

Ground 6. Ineffective assistance of counsel in violation of petitioner's Sixth and Fourteenth Amendment rights.

Fact 1. Petitioner claims that the cumulative effect of the errors based on ineffective assistance of counsel, listed below, prejudiced the trial to the extent that no reasonable juror could have found the petitioner guilty of all the crimes charged.

a. Counsel failed to object to prejudicial prosecutorial misconduct related to the State's closing argument in which the state allegedly stated that the victim suffered a laceration to her genital area, when in fact she had only a "very small superficial abrasion."<sup>9</sup>

b. Counsel failed to object to the trial court's denial of the petitioner's motion for a mistrial. A mistrial was warranted given that the court allowed the victim to walk into the courtroom carrying a stuffed "Tigger" doll, and jurors heard the victim's mother sobbing loudly during the victim's testimony.<sup>10</sup>

c. Counsel failed to interview every one of the state's witnesses. In particular, counsel failed to interview Kay Barrett, the witness who saw the victim wandering in Redrock Calico Basin following the sexual assault, and Dr. Frederick Buhn, the physician who examined the victim following the

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<sup>7</sup> This claim is made in Ground 1(6)(d) of the First Federal Petition.

<sup>8</sup> This claim is made in Ground 1(2)(a) of the First Federal Petition.

<sup>9</sup> This claim is made in Ground 1(6)(a) of the First Federal Petition.

<sup>10</sup> This claim is made in Ground 1(6)(e) of the First Federal Petition.

assault.<sup>11</sup>

d. Counsel failed to object to and investigate the alleged break in custody of the petitioner's car in which the assault took place.<sup>12</sup>

e. Counsel failed to present any evidence demonstrating a lack of motive on the petitioner's part to commit the sexual assault, such as evidence of his goal-oriented activities.<sup>13</sup>

Ground 7. Due to the cumulative effect of the ineffective assistance of counsel the petitioner received, petitioner was denied a fair trial, in violation of the Sixth and Fourteenth Amendments.

Respondents answered petitioner's Second Federal Petition (3:05-cv-00316, docket 18), and the petitioner replied (3:05-cv-00316, docket 22).

## II. Federal Habeas Corpus Standards

28 U.S.C. §2254(d), a provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides the legal standard for the Court's consideration of this habeas petition:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based

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<sup>11</sup> These claims were made in Ground 1(5)(a) and (b) of the First Federal Petition.

<sup>12</sup> This claim is made in Ground 1(4)(a) of the First Federal Petition.

<sup>13</sup> This claim is made in Ground 1(1)(b) of the First Federal Petition.

1           on an unreasonable determination of the facts  
2           in light of the evidence presented in the State  
3           court proceeding.

4           28 U.S.C. §2254(d).

5           A state court decision is contrary to clearly established  
6           Supreme Court precedent, within the meaning of 28 U.S.C. § 2254,  
7           “if the state court applies a rule that contradicts the governing  
8           law set forth in [the Supreme Court’s] cases” or “if the state  
9           court confronts a set of facts that are materially  
10          indistinguishable from a decision of [the Supreme Court] and  
11          nevertheless arrives at a result different from [the Supreme  
12          Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73  
13          (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000),  
14          and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

15          A state court decision is an unreasonable application of  
16          clearly established Supreme Court precedent, within the meaning of  
17          28 U.S.C. § 2254(d), “if the state court identifies the correct  
18          governing legal principle from [the Supreme Court’s] decisions but  
19          unreasonably applies that principle to the facts of the prisoner’s  
20          case.” *Lockyer v. Andrade*, 538 U.S. at 75 (quoting *Williams*, 529  
21          U.S. at 413). The “unreasonable application” clause requires the  
22          state court decision to be more than incorrect or erroneous; the  
23          state court’s application of clearly established law must be  
24          objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

25          In determining whether a state court decision is contrary to,  
26          or an unreasonable application of, federal law, this Court looks to  
27          the state courts’ last reasoned decision. See *Ylst v. Nunnemaker*,  
28          501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072,



1 1079 n.2 (9th Cir. 2000), *cert. denied*, 534 U.S. 944 (2001).

2 Moreover, "a determination of a factual issue made by a State  
3 court shall be presumed to be correct," and the petitioner "shall  
4 have the burden of rebutting the presumption of correctness by  
5 clear and convincing evidence." 28 U.S.C. § 2254(e) (1).

6  
7 III. Standards Governing Claims of Ineffective Assistance of  
8 Counsel

9 The bulk of petitioner's constitutional claims in his first  
10 and second petitions for habeas relief are for ineffective  
11 assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668  
12 (1984), the Supreme Court established the standards by which claims  
13 of ineffective counsel are to be measured. In *Strickland*, the  
14 Court propounded a two prong test; a petitioner claiming  
15 ineffective assistance of counsel must demonstrate (1) that the  
16 defense attorney's representation "fell below an objective standard  
17 of reasonableness," and (2) that the attorney's deficient  
18 performance prejudiced the defendant such that "there is a  
19 reasonable probability that, but for counsel's unprofessional  
20 errors, the result of the proceeding would have been different."  
21 *Strickland*, 466 U.S. at 688, 694.

22 Regarding the first prong of the test, the *Strickland* Court  
23 expressly declined to articulate specific guidelines for attorney  
24 performance beyond generalized duties, including the duty of  
25 loyalty, the duty to avoid conflicts of interest, the duty to  
26 advocate the defendant's cause, and the duty to communicate with  
27 the client over the course of the prosecution. *Id.* at 688.  
28 Defense counsel's duties are not to be defined so exhaustively as

1 to give rise to a "checklist for judicial evaluation ... [because]  
2 [a]ny such set of rules would interfere with the constitutionally  
3 protected independence of counsel and restrict the wide latitude  
4 counsel must have in making tactical decisions." *Id.* at 688-89.

5 The *Strickland* Court instructed that review of an attorney's  
6 performance must be "highly deferential," and must adopt counsel's  
7 perspective at the time of the challenged conduct, in order to  
8 avoid the "distorting effects of hindsight." *Id.* at 689. A  
9 reviewing court must "indulge a strong presumption that counsel's  
10 conduct falls within the wide range of reasonable professional  
11 assistance ... [and] the [petitioner] must overcome the presumption  
12 that ... the challenged action might be considered sound trial  
13 strategy." *Id.* (citation omitted).

14 Construing the Sixth Amendment to guarantee not effective  
15 counsel *per se*, but rather a fair proceeding with a reliable  
16 outcome, the *Strickland* Court concluded that demonstrating that  
17 counsel fell below an objective standard of reasonableness alone is  
18 insufficient to warrant a finding of ineffective assistance. In  
19 order to satisfy *Strickland's* second prong, the defendant must show  
20 that the attorney's sub-par performance prejudiced the defense.  
21 *Id.* at 691-92. The test is whether there is a reasonable  
22 probability that, but for the attorney's challenged conduct, the  
23 result of the proceeding in question would have been different.  
24 *Id.* at 691-94. The Court defined reasonable probability as "a  
25 probability sufficient to undermine confidence in the outcome."  
26 *Id.* at 694.

27 The *Strickland* Court was clear that both deficient  
28 representation and prejudice are necessary showings to support an

1 ineffectiveness claim, and the Court expressly instructed that  
2 "a court need not determine whether counsel's performance was  
3 deficient before examining the prejudice suffered by the defendant  
4 as a result of the alleged deficiencies.... If it is easier to  
5 dispose of an ineffectiveness claim on the ground of lack of  
6 sufficient prejudice, which we expect will often be so, that course  
7 should be followed." *Id.* at 697.

8  
9 IV. Analysis

10 Even though petitioner's Second Federal Petition is ordered  
11 differently from his First Federal Petition, the claims made in the  
12 second may be identified somewhere in the first. To avoid any  
13 confusion concerning the different numbering schemes the petitioner  
14 used in his first and second petitions, the court will reference  
15 the claims according to the numbering format in his First Federal  
16 Petition, with a footnote reference to its location in the Second  
17 Federal Petition. However, as respondents point out, a few of the  
18 claims petitioner made in his First Federal Petition that were  
19 deemed exhausted by the court in its June 17, 2004, order do not  
20 appear in petitioner's Second Federal Petition. Respondents take  
21 the position that, as petitioner did not re-state those claims in  
22 his Second Federal Petition, he has effectively waived those  
23 claims. (Resp. Answer at 23). In light of the fluid nature of  
24 petitioner's claims, many of which appear factually closely  
25 entwined and occasionally indistinguishable, as well as the court's  
26 obligation to construe a *pro se* litigant's pleadings liberally, the  
27 court will address all those claims found exhausted in his First  
28 Federal Petition, as well as the exhausted claims presented in his

1 Second Federal Petition.

2  
3 1. Ineffective Assistance of Counsel Claims Denied by the  
4 Nevada Supreme Court

5 a. Overview of Claims

6 In Ground 1(1)(a)<sup>14</sup> petitioner claims that his counsel was  
7 ineffective for failing to produce Jennifer Richards, a witness who  
8 could have refuted the timeline of the events of the crime that the  
9 victim presented, and supported petitioner's version. In addition,  
10 petitioner claims in this ground that his counsel was ineffective  
11 by not producing a receipt from a convenience store petitioner  
12 allegedly patronized at the time of the crime, which would have  
13 undermined the victim's version of events.

14 In Ground 1(1)(c)<sup>15</sup> petitioner claims that his counsel was  
15 ineffective when he failed to produce his ex-girlfriend, Priscilla  
16 Pacheco, who would have testified to Black's character and "goal-  
17 oriented activities," and would have provided testimony to  
18 undermine the victim's testimony at trial.

19 In Ground 1(2)(a)<sup>16</sup> petitioner claims that counsel was  
20 ineffective because of his failure to investigate the burglary of  
21 the petitioner's residence following his arrest. Petitioner  
22 alleges he provided his counsel with facts to investigate that  
23 would have substantiated this defense, including statements made by  
24 the victim, a stolen address book which Jackson used to call  
25 certain individuals connected to the petitioner, and documents

26  
27 <sup>14</sup> Ground 1(1)(a) of Second Federal Petition.

28 <sup>15</sup> Ground 1(1)(b) of Second Federal Petition.

<sup>16</sup> Ground 5(1) of Second Federal Petition.

1 pertaining to the petitioner's prior criminal conviction.

2 In Ground 1(3)<sup>17</sup> petitioner claims that his counsel was  
3 ineffective because of his failure to investigate the victim, and  
4 to request a psychological examination of her. Petitioner claims  
5 that such an examination would have provided insight into her  
6 motives to lie and set up the petitioner. The examination would  
7 also have shown how "troubled" the victim was, in part because of  
8 her sexual background.

9 In Ground 1(4) (b)<sup>18</sup> petitioner claims that his counsel was  
10 ineffective because of his failure to engage a criminalistics  
11 expert to examine the car in which the sexual activity allegedly  
12 took place for exculpatory evidence. According to the petitioner,  
13 such an expert would have been able to refute the state's claim  
14 that any tests on the car would have been useless because of the  
15 car's condition.

16 In Ground 1(6) (d)<sup>19</sup> petitioner claims that his counsel did not  
17 object to a possible Sixth Amendment violation of the petitioner's  
18 right to confront witnesses. He asserts that because the  
19 prosecution relied on statements made by the victim of the  
20 petitioner's previous sexual assault, he should have been able to  
21 confront that victim at trial. The petitioner claims that there is  
22 some dispute as to the reliability of the victim's statements  
23 concerning the petitioner's behavior during that crime.

24 In Ground 1(9)<sup>20</sup> petitioner claims that the cumulative effect  
25

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26 <sup>17</sup> Ground 2 of Second Federal Petition.

27 <sup>18</sup> Ground 3(1)(a) of Second Federal Petition.

28 <sup>19</sup> Ground 4 of Second Federal Petition.

<sup>20</sup> Ground 7 of Second Federal Petition.

1 of counsel's failures amounted to a breakdown in the adversarial  
2 process, and as a consequence, the trial was unfair, and its  
3 outcome unreliable.

4  
5  
6 b. Denial of Grounds 1(1)(a), 1(1)(c), 1(2)(a)

7  
8 Petitioner raised grounds 1(1)(a), 1(1)(c), and 1(2)(a) of his  
9 First Federal Petition in his first state petition for habeas  
10 relief in Nevada trial court, and, upon their denial there,  
11 appealed the claims to the Nevada Supreme Court. (Exhibit X,  
12 Ground I(A)). Each of the claims relates to the petitioner's trial  
13 counsel's alleged ineffectiveness in investigating petitioner's  
14 version of events, which he believes would have been substantiated  
15 by testimony from additional witnesses. While petitioner's brief  
16 to the Nevada Supreme Court did not specifically identify all of  
17 the witnesses that are named in the federal claim, it does  
18 reiterate the argument presented in the state petition, which did  
19 in fact identify the witnesses. See Exhibits E, K. The Nevada  
20 Supreme Court affirmed the denial, stating, "[a] thorough review of  
21 the record reveals BLACK's claims of ineffective assistance of  
22 counsel are wholly without merit. BLACK has not shown his counsel  
23 to be deficient or that he was prejudiced by his counsel's  
24 actions." (Exhibit CC at p.2). With respect to petitioner's claim  
25 that his counsel was ineffective for failing to investigate  
26 petitioner's version of the events, the Court held that "the  
27 evidence [against BLACK] was overwhelming and the slight benefit  
28 that could have been obtained did not affect the trial outcome."

1 (Id.). The court cited to *Evans v. State*, 28 P.3d 498, 507 (Nev.  
2 2001) (citing *Kirksey v. State*, 923 P.2d 1102, 1107 (Nev. 1996)),  
3 and *Strickland v. Washington*, 466 U.S. 668, 687 (1984), for the  
4 proposition that to succeed on a claim of ineffective assistance of  
5 counsel, the petitioner must show that his counsel's performance  
6 was both "deficient and prejudicial." (Exhibit CC at 2).

7 To succeed with his ineffective assistance of counsel claims  
8 in his habeas petition here, petitioner must demonstrate that the  
9 Nevada Supreme Court's holding was contrary to clearly established  
10 Supreme Court precedent. Furthermore, petitioner must carry his  
11 burden under *Lockyear v. Andrade*, of demonstrating that its  
12 application of the Supreme Court's case law was objectively  
13 unreasonable. *Lockyear*, 538 U.S. at 75. He has not done so. In  
14 its affirmance, the Nevada Supreme Court clearly identified the  
15 appropriate standard articulated by the United States Supreme  
16 Court, and its application of the facts of this case to that  
17 standard is entitled to deference. *Strickland*, 466 U.S. at 689.  
18 The petitioner has failed to carry his burden of proof. **Grounds**  
19 **1(1)(a), 1(1)(c), 1(2)(a) of the petition are therefore denied.**

20  
21 c. Denial of Ground 1(3)

22 Petitioner raised Ground 1(3) in his First State Petition, and  
23 upon its denial, appealed the claim to the Nevada Supreme Court.  
24 (Exhibit X, Ground I(D)). Addressing petitioner's claim in this  
25 ground that his trial counsel was ineffective for failing to  
26 conduct a psychological examination of the victim, the Nevada  
27 Supreme Court found:

1 "A defendant is entitled to have a child-victim  
2 psychologically examined if he provides a compelling reason  
3 for the examination.<sup>21</sup> This court weighs three factors to  
4 determine whether a compelling reason existed. The factors  
5 are (1) whether the prosecution used a psychological expert;  
6 (2) minimal or no corroboration beyond the child victim's  
7 testimony; and (3) a reasonable basis for believing the  
8 emotional or mental state of the victim might have had an  
9 effect on her veracity.<sup>22</sup> Black's counsel might have thought a  
10 request for a psychological examination imprudent without a  
11 compelling reason. Evidence of Black's guilt was overwhelming  
12 and the prosecution did not present evidence of the child-  
13 victim's psychological state of mind. Further, the record  
14 does not reflect that the child-victim's veracity was affected  
15 by her emotional or mental state. We therefore conclude this  
16 claim is without merit."

17 (Exhibit CC at 2-3).

18 As stated above, this court must exercise deference in its  
19 review of the Nevada Supreme Court's decision, and the petitioner  
20 must demonstrate that its application of the Supreme Court's case  
21 law was objectively unreasonable. *Lockyear*, 538 U.S. at 75.  
22 Furthermore, to succeed on this claim here, petitioner must  
23 demonstrate that his counsel at trial did not exercise reasonable  
24 professional judgment in his decision not to conduct a  
25 psychological examination of the victim, and must overcome the  
26 presumption that, "under the circumstances, the challenged action  
27 'might be considered sound trial strategy.'" *Strickland*, 466 U.S.  
28 at 689-90 (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

Petitioner has failed to demonstrate that the Nevada Supreme Court misapplied Supreme Court case law. The Nevada Supreme Court concluded that petitioner's trial counsel exercised professional judgment in his decision not to conduct a psychological examination of the victim, and in light of the "overwhelming" evidence of

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<sup>21</sup> Citing *Koerschner v. State*, 13 P.3d 451, 455 (Nev. 2000).

<sup>22</sup> Citing *Koerschner*, 13 P.3d at 455.



petitioner's guilt, his decision was reasonable. This conclusion is consistent with the Supreme Court's holding in *Strickland* that counsel must be accorded deference in those decisions that reflect sound trial strategy. Petitioner argues that the victim had a "troubled emotional state of mind," and that a psychological examination would have revealed her "capacity to fabricate charges of sexual crimes." (Second Fed. Pet. at 17). His defense at trial and through his habeas petition includes the claim that the victim sought to entrap him so that her mother and mother's boyfriend could burglarize his apartment. The Nevada Supreme Court found that these arguments did not present a compelling reason for a psychological examination, and that petitioner's trial counsel's election to forego a psychological examination was reasonable. This court agrees, and for these reasons, **Ground 1(3) is denied.**

d. Denial of Ground 1(4) (b)

In ground 1(4) (b), petitioner states that his trial counsel was ineffective for failing to conduct a criminalistics analysis of the car. He raised this claim in his first state petition, and, upon its denial by the trial court, petitioner appealed it to the Nevada Supreme Court. (Exhibit X, Ground II(A)). The Nevada Supreme Court concluded that:

"... forensic tests of BLACK's vehicle would have been useless due to its post-accident condition. Trial counsel cross-examined officers about their failure to perform tests on the vehicle and challenged the State's contention that dirt and debris prevented the officers from finding evidence of the sexual assault. Trial counsel was not ineffective for opting to forego an expert witness to testify that there was a remote possibility evidence could have been retrieved from BLACK's vehicle."

(Exhibit CC at 3-4).

1       The court denies this ground for the same reasons as those  
2 previously discussed. Petitioner has not indicated how the Nevada  
3 Supreme Court's holding is a clearly unreasonable application of  
4 Supreme Court precedent, nor has he shown that his trial counsel's  
5 actions amounted to ineffective assistance of counsel such that,  
6 had his counsel sought the testimony of a criminalistics expert,  
7 there is a reasonable probability that the outcome of the trial  
8 would have been different. **Ground 1(4)(b) is therefore denied.**

9  
10       e. Denial of Ground 1(6)(d)

11       Petitioner also raised Ground 1(6)(d) in his first state  
12 petition, and, upon its denial by the trial court, appealed to the  
13 Nevada Supreme Court. (Exhibit X, Ground II(C)). Petitioner  
14 alleges that his counsel was ineffective for failing to object to  
15 the use by the prosecution of statements made by the victim of  
16 petitioner's previous sexual assault. Specifically, he claims that  
17 he should have been able to confront the victim of his previous  
18 crime as long as the prosecution was going to use statements she  
19 made at the time of the previous crime. In its affirmance of the  
20 trial court's denial of the petition, the Nevada Supreme Court  
21 stated,

22       "BLACK argues counsel was ineffective for failing to object to  
23 the officer's belief that BLACK forced the elderly-victim to  
24 urinate and defecate on him. We conclude the evidence was clear  
25 and convincing that BLACK's assault of the elderly-victim involved  
26 bodily-excretion. An officer testified that the elderly-victim  
27 said BLACK raped her, sodomized her, and forced her to perform  
28 fellatio on him. Fecal matter was found on the elderly-victim's  
body. Further, BLACK admitted during an interview with Oregon  
police that he forced the elderly-victim to urinate and defecate on  
him. . . . Furthermore, BLACK is barred from raising a  
confrontation clause claim regarding prior statements made by the  
elderly-victim because he did not raise the claim on direct  
appeal."

1 (Exhibit CC at 4-5).

2 The court denies petitioner's claim for similar reasons as  
3 stated above. First, petitioner has not shown that the Nevada  
4 Supreme Court failed to apply the appropriate Supreme Court  
5 precedent to this claim. At petitioner's trial, the court allowed  
6 the introduction of testimony by an Oregon officer concerning  
7 statements made by the victim of petitioner's sexual assault  
8 conviction there. The court allowed the evidence on the basis that  
9 it helped establish petitioner's motive, intent, and modus operandi  
10 for the assault against Britni Debarge. The Nevada Supreme Court  
11 concluded that the trial court's decision was properly based on  
12 clear and convincing evidence, consistent with the requirements of  
13 *Petrocelli v. State*, 101 Nev. 46 (1985). Petitioner has not  
14 demonstrated that this finding is inconsistent with Supreme Court  
15 precedent. See, e.g., *Huddleston v. U.S.*, 485 U.S. 681, 685 (1988)  
16 ("... such evidence [of prior bad acts] should be admitted if  
17 there is sufficient evidence to support a finding by a jury that  
18 the defendant committed the similar act.").

19 Second, petitioner's claim does establish that his counsel's  
20 conduct fell below the "objective standard of reasonableness"  
21 established by *Strickland*, or that, even accepting petitioner's  
22 argument that his counsel erred, the result of the proceeding would  
23 have been different had he challenged the prosecution's use of the  
24 Oregon victim's statements, given the overwhelming nature of the  
25 evidence against the petitioner. Even had the trial court denied  
26 admission of the statements by the Oregon victim, the trial court  
27 concluded that the fact of the prior conviction itself was  
28 admissible, given its proximity in time. (Exhibit GG at 14-16).

1 **For these reasons, Ground 1(6)(d) is denied.**

2  
3 f. Denial of Ground 1(9)

4 In Ground 1(9) petitioner argues that the cumulative effect of  
5 his counsel's errors amounted to an unfair trial. This ground was  
6 also raised in his First State Petition, and, upon its denial, he  
7 appealed it to the Nevada Supreme Court. (Exhibit X, Ground 2(e)).  
8 That court concluded, "[T]he cumulative effect of BLACK's alleged  
9 errors was insufficient to deprive him of a fair trial because his  
10 claims of error are meritless." (Exhibit CC at 6). Again,  
11 petitioner fails to demonstrate why the Nevada Supreme Court's  
12 holding misapplies Supreme Court precedent. Petitioner failed to  
13 show that his counsel's assistance was "so defective as to require  
14 reversal of a conviction," as would be required under *Strickland*.  
15 *Strickland*, 466 U.S. at 687. His claims of ineffective assistance,  
16 taken individually or cumulatively, do not adequately establish  
17 grounds for habeas relief, and **Ground 1(9) is therefore denied.**

18  
19 2. Claims Defaulted by Nevada Supreme Court

20  
21 a. Overview of Claims

22 In Ground 1(1)(b)<sup>23</sup> petitioner claims that his counsel was  
23 ineffective for failing to inform the jury about his "goal-oriented  
24 activities," which included his efforts to secure a job, a car, and  
25 insurance. Petitioner believes that these efforts demonstrated his  
26 desire to put his life together, and would have undermined the

27  
28 

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<sup>23</sup> Ground 6(1)(e) of Second Federal Petition.

1 allegation that he had the state of mind to commit the sexual  
2 assault.

3 In Ground 1(4) (a)<sup>24</sup> petitioner claims that his counsel was  
4 ineffective for failing to investigate the break in the chain of  
5 custody of the car in which the sexual assault allegedly took  
6 place. According to the petitioner, the state disposed of the car  
7 before petitioner had a chance to examine it. Of particular  
8 importance would have been the lack of any evidence such as urine  
9 deposits in the back of the car, which would have undermined the  
10 victim's version of events.

11 In Ground 1(5) (a)<sup>25</sup> petitioner claims that his counsel was  
12 ineffective for failing to interview Kay Barrett, the woman who had  
13 discovered the victim "hobbling" half-naked on the road where she  
14 was driving. Petitioner suggests that there was ample evidence to  
15 refute Barrett's testimony.

16 In Ground 1(5) (b)<sup>26</sup> petitioner claims that his counsel was  
17 ineffective for failing to interview Dr. Bruhn, the state's medical  
18 expert who examined the victim following the assault and determined  
19 that there had been "probable abuse." Petitioner claims that his  
20 counsel's cross-examinations did not adequately address the  
21 doctor's claims.

22 In Ground 1(6) (a)<sup>27</sup> petitioner claims that his counsel failed  
23 to object to a number of false and prejudicial statements made  
24 during the state's closing arguments.

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25  
26 <sup>24</sup> Grounds 3 and 6(1)(d) of Second Federal Petition.

27 <sup>25</sup> Ground 6(1)(c) of the Second Federal Petition.

28 <sup>26</sup> Ground 6(1)(c) of the Second Federal Petition.

<sup>27</sup> Ground 6(1)(a) of the Second Federal Petition.

1 In Ground 1(6)(e)<sup>28</sup> petitioner claims that his counsel failed  
2 to object to a possible Sixth Amendment violation of petitioner's  
3 right to confront the witnesses against him. According to his  
4 argument, because the state relied on statements made by the victim  
5 of the petitioner's previous sexual assault in Oregon, petitioner  
6 should have been able to confront her in his trial. Petitioner  
7 also claims that there is some dispute as to whether her statements  
8 in the previous trial were reliable.

9  
10 b. Denial of Grounds 1(1)(b), 1(4)(a), 1(5)(a), and (b), and  
11 1(6)(a) and (e)

12 The Nevada Supreme Court denied Grounds 1(1)(b), 1(4)(a),  
13 1(5)(a), and (b), and 1(6)(a) and (e) of petitioner's Second  
14 Federal Petition as they were presented in his Second State  
15 Petition on the grounds that they were untimely and successive  
16 pursuant to Nevada statutory authority. (Exhibits PP and UU). The  
17 court held that because the petitioner simply rehashed the claims  
18 he had made in his First State Petition, he could not show cause to  
19 overcome the procedural bar, even though he had returned to state  
20 court on the order of this court to exhaust his unexhausted claims  
21 presented in his First Federal Petition. (Exhibit UU). As these  
22 claims were denied on independent and adequate state law grounds,  
23 to wit, Nev. Rev. Stats. §§ 34.726 and 34.810, the claims do not  
24 admit of review in this court's habeas jurisdiction. See *Coleman*  
25 *v. Thompson*, 501 U.S. 722, 729-30 (1991) ("the [independent and  
26 adequate state ground] doctrine applies to bar federal habeas when  
27

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28 <sup>28</sup> Ground 6(1)(b) of the Second Federal Petition.

1 a state court declined to address a prisoner's federal claims  
2 because the prisoner had failed to meet a state procedural  
3 requirement"). Nor has petitioner shown cause for the procedural  
4 default, or any actual prejudice that could be attributed to it,  
5 that would allow this court to review the claims. In *Murray v.*  
6 *Carrier*, the Supreme Court stated that to demonstrate cause for a  
7 procedural default, a prisoner must be able to "show that some  
8 objective factor external to the defense impeded" his efforts to  
9 comply with the state procedural rule. 477 U.S. 478, 479 (1986).  
10 Further, the Ninth Circuit has held that Nevada's procedural bar  
11 against claims that could have been brought on direct appeal, but  
12 were not, is an adequate and independent ground sufficient to  
13 support a finding of procedural default. *Vang v. Nevada*, 329 F.3d  
14 1069, 1074 (9th Cir. 2003). Petitioner has made no showing that  
15 this court should consider his defaulted claims. **Grounds 1(1)(b),**  
16 **1(4)(a), 1(5)(a), and (b), and 1(6)(a) and (e) are therefore**  
17 **denied.**

18  
19 3. Denial of 1(1)(d) and 1(2)(e)

20  
21 Defendants argue that petitioner has waived those claims he  
22 raised in his first petition before this court that were deemed  
23 exhausted, but which petitioner did not raise in the second  
24 petition now before this court. These include 1(1)(d) and 1(2)(e).

25 Even if the court were to accept that the petitioner did not  
26 waive these claims, the court concludes that they should be denied  
27 on some of the grounds already articulated in this order. In  
28 1(1)(d), the petitioner argues that his counsel was ineffective for

1 failing to produce the father of his ex-girlfriend, Frank Pacheco,  
2 who would have testified to Black's character and "goal-oriented  
3 activities," such as his efforts to secure a job and financial  
4 stability. The court finds that this claim of ineffective  
5 assistance of counsel fails to meet either of the prongs  
6 articulated in the *Strickland* test. To the extent that  
7 petitioner's counsel failed to interview certain witnesses, or to  
8 pursue the strategy the petitioner suggests he should have, those  
9 failings do not fall below an objective standard of reasonableness,  
10 nor do they establish that there is a reasonable probability that  
11 the outcome of the trial would have been different had petitioner's  
12 counsel conducted the case as he suggests. The fact that  
13 petitioner was taking steps to put his life on firmer grounds  
14 financially by securing employment and seeking additional  
15 education, even accepted as true, could not have played a part in  
16 the jury's consideration of his culpability for the crime at issue.  
17 It was therefore well within his counsel's reasonable discretion  
18 not to produce a character witness to testify to these things.

19 In 1(2)(e) petitioner adds further detail to the principal  
20 claim he asserts in 1(2) that his counsel was ineffective for  
21 failing to investigate the burglary of his apartment following his  
22 arrest. Specifically, petitioner claims his counsel failed to  
23 "procure" Jennifer Richards, a friend of the victim Britni DeBarge,  
24 to learn about her role in the burglary of petitioner's apartment.  
25 This claim was encompassed in petitioner's principal defense at  
26 trial, that the crime for which he was convicted was part of an  
27 elaborate set-up by the victim, her mother, and her mother's  
28 boyfriend, that included the burglary of his apartment. Her



1 testimony would have added little light to petitioner's claim,  
2 which was rejected by the jury, and upon all subsequent reviews.  
3 It also fails to meet the *Strickland* standard, as petitioner has  
4 failed to establish that there was a reasonable probability that  
5 the outcome of the trial would have been different had petitioner's  
6 counsel pursued this witness as the petitioner claims. Having  
7 presented petitioner's burglary defense during trial, counsel's  
8 apparent decision not to present Jennifer Richards for the purpose  
9 petitioner describes was clearly within his reasonable discretion,  
10 and does not call into question the outcome of the trial. **For**  
11 **these reasons, Grounds 1(1) (d) and 1(2) (e) are denied.**

12  
13 4. Petitioner's Waiver of 1(2) (b), (c) and (d), 1(6) (b), (c)  
14 and (f), 1(7) (a) and (b), and 2-9

15 Petitioner raised claims 1(2) (b), (c) and (d) and 1(6) (b), (c)  
16 and (f), 1(7) (a) and (b), and 2-9 in his First Federal Petition,  
17 but the court found those claims unexhausted (Docket 33). Although  
18 Petitioner elected to return to state court to exhaust those claims  
19 found unexhausted, he did not re-present these claims in his Second  
20 Federal Petition. The court therefore finds that petitioner has  
21 waived these claims. **For these reasons, Grounds 1(2) (b), (c) and**  
22 **(d) and 1(6) (b), (c) and (f), 1(7) (a) and (b), and 2-9 are denied.**

23  
24 V. Certificate of Appealability

25 The standard for issuance of a certificate of  
26 appealability calls for a "substantial showing of the denial of a  
27 constitutional right." 28 U.S.C. §2253(c). The Supreme Court has  
28 interpreted 28 U.S.C. §2253(c) as follows:

1           Where a district court has rejected the  
2           constitutional claims on the merits, the  
3           showing required to satisfy §2253(c) is  
4           straightforward: The petitioner must  
5           demonstrate that reasonable jurists would find  
6           the district court's assessment of the  
7           constitutional claims debatable or wrong. The  
8           issue becomes somewhat more complicated where,  
9           as here, the district court dismisses the  
10          petition based on procedural grounds. We hold  
11          as follows: When the district court denies a  
12          habeas petition on procedural grounds without  
13          reaching the prisoner's underlying  
14          constitutional claim, a COA should issue when  
15          the prisoner shows, at least, that jurists of  
16          reason would find it debatable whether the  
17          petition states a valid claim of the denial of  
18          a constitutional right and that jurists of  
19          reason would find it debatable whether the  
20          district court was correct in its procedural  
21          ruling.

22          *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v.*  
23          *Giles*, 221 F.3d 1074, 1077-79 (9th Cir. 2000). The Supreme Court  
24          further illuminated the standard for issuance of a certificate of  
25          appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The  
26          Court stated in that case:

27               We do not require petitioner to prove, before  
28               the issuance of a COA, that some jurists would  
              grant the petition for habeas corpus. Indeed,  
              a claim can be debatable even though every  
              jurist of reason might agree, after the COA has  
              been granted and the case has received full  
              consideration, that petitioner will not  
              prevail. As we stated in *Slack*, "[w]here a  
              district court has rejected the constitutional  
              claims on the merits, the showing required to  
              satisfy § 2253(c) is straightforward: The  
              petitioner must demonstrate that reasonable  
              jurists would find the district court's  
              assessment of the constitutional claims  
              debatable or wrong."

29          *Miller-El*, 123 S.Ct. at 1040 (quoting *Slack*, 529 U.S. at 484).

30          The Court has considered the issues raised by petitioner,  
31          with respect to whether they satisfy the standard for issuance of a

1 certificate of appeal, and determines that none of the issues  
2 raised by the petitioner meets that standard. Accordingly, the  
3 Court denies the certificate of appealability with respect to all  
4 issues petitioner has raised.

5  
6  
7 VI. Conclusion  
8

9 **IT IS THEREFORE ORDERED** that petitioner's petitions for a  
10 writ of habeas corpus (3:03-cv-00292, docket 10; 3:05-cv-00316,  
11 docket 2) are **DENIED**.

12 **IT IS FURTHER ORDERED** that the Clerk shall **ENTER JUDGMENT**  
13 **ACCORDINGLY**.

14 **IT IS FURTHER ORDERED** the certificate of appealability is  
15 denied with respect to all issues raised in this petition for a  
16 writ of habeas corpus.

17  
18 **IT IS SO ORDERED.**

19 DATED: This 23<sup>rd</sup> day of June, 2008.

20   
21

22 UNITED STATES DISTRICT JUDGE  
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